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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-596

GULF OIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT TEXAS EASTERN TRANSMISSION CORPORATION IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The Third Circuit correctly decided that the Federal Power Commission was not required to defer to a private arbitration board in determining issues which go to the heart of Gulf's obligation under its contract with Texas Eastern and which directly and substantially affect the public interest. Beyond that, the warranty-type contract involved here is unique. Very few were made.[1] It is unlikely that any more commitments of this nature will be made by producers in the future.

[1] Unlike the usual gas purchase contract, which dedicates gas from a specific source of supply, Gulf undertook in the warranty agreement to make the contract volumes available to Texas Eastern without regard to any particular supply source.

For a period of several months before the Commission issued the show cause order which set this proceeding in motion, Gulf had failed to deliver the contract volumes to Texas Eastern. Following the initiation by the Commission of these proceedings, Gulf purported to invoke the arbitration cause as a device to limit the unconditional nature of the delivery obligation as stated in the contract (III. App. 1286-87). Thereafter, Gulf expanded the "issues" which it was undertaking to submit to arbitration to include an issue which would have excused its non-performance (III App. 1610-12).

Gulf's summary of the "issues" does not do justice to them. Specifically, Gulf would have a private arbitration board decide:

> (1) Whether Gulf's obligation for delivery of gas to Texas Eastern under the 1964 Gas Contract is limited to gas produced in the vicinity of the delivery point as set out in Article III of such contract and secondary delivery points as established in amendments to the contract, taking into consideration the price provided by the contract, the volume of gas involved, and the cost of delivering such gas; and whether, in light of such obligation, that when such price, volume and cost are so taken into account, Gulf is obligated under such contract to deliver to Texas Eastern at such delivery points (or other points that may be added in subsequent amendments to the contract) only such gas as may be produced by or for the account of Gulf in sufficient quantities and within sufficient proximity to Texas Eastern's system to make it commercially practicable, when the volume of gas is compared with the cost of delivering such gas, for the cost to be incurred by Gulf;
>
> (2) Whether Gulf is, by reason of the mistake as to reserves in West Delta Block 27, the natural gas shortage, and other matters set forth in Exhibit "A" attached hereto, excused from delivering the daily contract quantity (or the maximum daily quantity

> when called for) as provided in the subject Gas Contract.
>
> (3) Whether the failure of the Department of the Interior to hold regular general offshore Louisiana lease sales from March, 1962, to March, 1972, constituted an act of force majeure within the provisions of Article X of the contract and operates to relieve Gulf of its obligations to deliver the contract quantities to the extent of Gulf's inability to do so from the date Gulf was unable to deliver such quantities until such time as Gulf, by the exercise of due diligence, can deliver to Texas Eastern such contract quantities and, further, whether Gulf's letters of March 17, 1972, and February 24, 1976, constituted timely notice to Texas Eastern of Gulf's claim of such force majeure. (III App. 1611-12).

Thus, what Gulf has called "arbitration issues" in this matter are in fact issues which either undertake to excuse past failure to perform or, by interpretation, to rewrite the terms of the contract to limit Gulf's future performance obligations.

Under the warranty contract, Gulf is to deliver approximately 4.4 Tcf of gas, at a rate of up to 625,000 Mcf per day when called upon to do so by Texas Eastern. These substantial volumes are clearly significant to Texas Eastern, its customers, and the consumers served by them. Texas Eastern is currently curtailing deliveries to its customers because of shortages of gas supplies. Any limitation of Gulf's delivery obligation would detrimentally affect Texas Eastern's ability to deliver gas to its customers on a daily basis. Further, these substantial volumes are being sold to Texas Eastern and its customers at a comparatively low price. It cannot, therefore, be disputed that Gulf's obligations under the warranty contract directly and substantially affect the public interest. They do not involve merely private contractual matters. Under the law as

established in *Wilko* v. *Swan*, 346 U.S. 427 (1953), such issues are not properly arbitrable. *See e.g., Cobb* v. *Lewis*, 488 F.2d 41, 47 (5th Cir. 1974) (antitrust claims); *Beckman Instruments, Inc.* v. *Technical Development Corp.*, 433 F.2d 55, 62-63 (7th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971) (patent claims).[2]

While Texas Eastern does not agree with the court below in all respects, Texas Eastern submits that the court was clearly correct in affirming the Commission's refusal to defer to arbitration.

[2] *See also In Re Kramer & Uchitelle, Inc.*, 288 N.Y. 467, 43 N.E.2d 493 (Ct. App. 1942) (Office of Price Administration Order); *Board of Education, Union Free School Dist. No. 9, Town of Islip, Suffolk County, West Islip, N. Y.* v. *West Islip Teachers Ass'n*, 328 N.Y.S.2d 266 (S. Ct. 1972) (Regulation of Salary and Fringe Benefits By Federal Agency); *cf. Wells* v. *Delta Airlines, Inc.* 398 *F. Supp.* 384 (E.D. Penn, 1975), *aff'd* 535 F.2d 1248 (3d Cir. 1976) (CAB Regulation of Airline Mergers) and *Nursing Home Local 1115* v. *Hialeah Convelescent Home, Inc.*, 348 F. Supp. 405, 411 (S.D. Fla. 1972) (Federal Wage and Price Control Programs).

CONCLUSION

Gulf Oil Corporation's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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